

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD J. DICKSHOTT, MANFRED
KAWAELDE, ANN R. KAWAELDE, and
DOROTHY CARLSON,

UNPUBLISHED
June 17, 2004

Plaintiffs-Appellants,

v

RON E. ANGELOCCI, d/b/a PROFIT CENTERS
GROUP,

No. 241722
Oakland Circuit Court
LC No. 00-024814-CK

Defendant-Appellee.

Before: Schuette, P.J., and Cavanagh and White, JJ.

WHITE, J. (*concurring in part and dissenting in part*).

I respectfully dissent from the majority's affirmance of the dismissal of plaintiff Manfred Kawaelde's negligent misrepresentation, intentional misrepresentation and fraudulent concealment claims on the basis that he failed to establish a genuine issue of material fact on the issue of reliance, from the affirmance of the dismissal of the negligence claim on the basis of the statute of limitations, and the affirmance of the dismissal of the intentional interference with an expected inheritance on the basis that no such action has yet been recognized by the Michigan Supreme Court or codified by the Legislature. I would remand for further proceedings as to each of these claims.

Initially, I observe that summary disposition of the misrepresentation and fraud claims was not granted on the basis of there being no genuine issue of material fact. Rather, the court granted summary disposition on the bases that plaintiff was not a proper party, that the claims had been released, and that the statutes of limitations had run. The majority has concluded that the circuit court erred in dismissing these claims on these bases, but concludes that the dismissal should nevertheless be affirmed for failure to show a genuine issue of material fact. Because this was not the basis of dismissal below, neither party has addressed whether plaintiff had, in fact, established a genuine issue. The dismissal of plaintiff's claims should not be affirmed on an alternative ground that was not briefed.

Further, I conclude that the record before us supports that there are genuine issues regarding these claims. The alleged misrepresentation and concealment here is not confined to the initial representation regarding the single-premium aspect of the policy. If this had been the only representation, and Kawaelde failed to read the policy or otherwise investigate, reliance on

Webb v First of Michigan Corp, 195 Mich App 470, 474; 491 NW2d 851 (1992), might be appropriate. However, Kawaelde contends, and there are facts to support, that the policy was, in fact, investigated in his behalf, that the defects were discovered, and that when defendant was questioned about the validity of his representations in light of plaintiff's agent's (Dickshott's) investigation, he reiterated the misrepresentations and continued to assert that the policy would only require the single premium.

Regarding the claim for professional negligence, plaintiff's claim accrued when defendant discontinued serving plaintiff in a professional capacity as to the matters out of which the claim for malpractice arose. MCL 600.5838(1) The trial court did not address this issue, and the matter should be remanded for a determination of when plaintiff's claim accrued under this provision.

Regarding plaintiff Carlson's claim of intentional interference with an expected inheritance, the majority correctly observes that this cause of action has not been recognized by the Michigan Supreme Court or codified by the Legislature. Nevertheless, it was impliedly recognized by this Court in *Estate of Doyle v Doyle*, 177 Mich App 546, 549; 442 NW2d 642 (1989). Further, legislation in this area would be most rare. While in the absence of legislation the Supreme Court clearly has the final word on whether such a cause of action exists in Michigan, that Court has not yet spoken, and that Court, and this Court as the intermediate appellate Court, are best able to determine whether to recognize such a cause of action and how to define its dimensions, in the context of an adequate factual development at the trial level. I have my own doubts whether, even if recognized, the cause of action should apply here, but that decision should be made after it is fleshed out at the trial level. Here, the case was dismissed on the basis that no such cause of action exists, not that there is no genuine issue as to its application here.

I would remand for further proceedings consistent with this opinion.

/s/ Helene N. White